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WESTSTAR CONSTRUCTION SDN BHD v. PRISMA ATHIRA ARCHITECT

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[CIVIL APPEAL NO: WA-12BC-22-12-2016]
B 30 JUNE 2017

CONTRACT: *Breach – Claim for services rendered – Architect as main consultant to appoint engineering consultant – Claim for agreed engineering consultancy fees by architect – Architect not duly registered under Registration of Engineers Act 1967 – Whether architect could claim for agreed engineering consultancy fees – Whether claim by architect for agreed engineering consultancy fees valid – Whether there was a breach of the Architects Rules 1996 – Whether architect merely claimed agreed engineering consultancy fees on behalf of engineering consultant*

D The respondent ('plaintiff'), as an architect, sued the appellant ('defendant') for the agreed engineering consultancy fees amounting to RM1,404,984. The defendant, on the other hand, counterclaimed against the plaintiff for negligence. In any event, the defendant contended, *inter alia*, that the plaintiff could not claim for the engineering consultancy fees as the plaintiff was not duly registered under the Registration of Engineers Act 1967 ('REA'). The E Sessions Court Judge ('SCJ'), however, allowed the plaintiff's claim and dismissed the defendant's counterclaim. Dissatisfied, the defendant appealed. It was contended by the defendant that the contract for the agreed engineering consultancy services and the fees arising out of it, was illegal and null and void and unenforceable. The defendant further argued that even though the F defence of illegality was not raised in the pleadings, but raised for the first time in the submission stage before the SCJ, the SCJ was nevertheless bound to take cognisance of it and decide accordingly. The issues that arose for determination, *inter alia*, were (i) whether illegality had to be pleaded; (ii) whether estoppel would apply as the defendant had agreed to the plaintiff, G as the main consultant, to appoint an engineering consultant *ie*, Iktisas Ingenieurs Sdn Bhd ('IISB') for the engineering consultancy services; and (iii) whether the claim by the plaintiff as an architect for the component of engineering consultancy fees was a valid claim permitted under the Architects Rules 1996.

H **Held (dismissing defendant's appeal):**

(1) It is clear that the plaintiff's fees, as agreed with the defendant, encompassed engineering fees. It was also clear that the plaintiff was a firm of architect and not engineers, and specifically the plaintiff was not registered as a professional engineer under the REA. The necessary legal I implication arising from the above was that the plaintiff was not a professional engineer with practising certificate, and was not entitled to recover in any court any fee, charge, remuneration or other form of consideration for any professional engineering services rendered. (paras 14, 15 & 16)

(2) Once a court of law is appraised of facts tending to support the suggestion of illegality, it must take notice *ex proprio motu* and even though not pleaded for clearly, no court could knowingly be party to the enforcement of an unlawful agreement. (para 23)

(3) Estoppel does not arise against any party raising the issue of illegality notwithstanding the party having participated in or even benefited from the illegal contract. The argument of estoppel would also fail since there could not be an estoppel to evade the plain provisions of a statute. (paras 29 & 31)

(4) The architect here was not providing the services of an engineering consultant but was merely invoicing the employer for the fees of the professional engineers in that it was merely collecting the engineering services fees on behalf of the engineering firm or body corporate as in this case. The Architects Rules 1996, coming after the REA 1967, must have taken into consideration the provisions of a prior statute in the REA before settling for r. 3 in permitting the architect to collect fees of the engineer on its behalf. Therefore, this was not a case of a specific statute trumping over a general one but rather two different statutes, one for the engineers under the REA and one for the architects under the Architects Act 1967 and both could be read harmoniously to accommodate each other. (paras 52 & 54)

(5) The defendant had no qualms or quarrel and consented to the plaintiff appointing IISB as the engineering consultant for the engineering consultancy services to be rendered. It could be safely surmised that the defence of illegality was raised as an afterthought for the first time in the written submission of the defendant and was not raised in the pleadings. Having therefore received a benefit under the said agreement in that the engineering services had been provided for on an agreed fee, it was then not open to the defendant to refuse to pay on the ground that the agreement was tainted with illegality. (paras 66 & 68)

(6) The defendant could not avoid its obligation to pay for the agreed fees for the engineering consultancy services rendered by IISB and billed through the plaintiff on the ground of illegality as the plaintiff had proceeded on the basis that it was perfectly permissible for it to do so and the defendant had even consented to this arrangement that had the approval of r. 3 of the Third Schedule to the Architects Rules 1996. Section 66 of the Contracts Act 1950 would apply to prevent the defendant from retaining the benefit of the engineering services rendered without payment and further would constrain the defendant to pay for the benefit it had received. (paras 72 & 73)

Case(s) referred to:

Browne v. Dunn HL (1894) 6 R 67 ***(refd)***
David Taylor & Son Ltd v. Barnett [1953] 1 All ER 843 ***(refd)***
Edler v. Auerbach [1949] 2 All ER 692 ***(refd)***
Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC ***(refd)***
Lion Asia Investment Pte Ltd v. Atelier Adt International Consultants Ltd & Anor [2002] 5 CLJ 86 HC ***(refd)***
Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***
Ng Siew Lan v. John Lee Tsun Vui & Anor [2017] 2 CLJ 245 FC ***(refd)***
Ng Siew San v. Menaka [1973] 1 LNS 99 FC ***(refd)***
Norman Disney & Young v. Affifi Hj Hassan [2011] 1 CLJ 210 HC ***(refd)***
Ramachandram Appalanaidu & Ors v. Dato Bandar Kuala Lumpur & Anor [2012] 1 LNS 625 CA ***(refd)***
Raymond Banham & Anor v. Consolidated Hotels Ltd [1975] 1 LNS 141 HC ***(refd)***
Sami Mousawi-Utama Sdn Bhd v. Kerajaan Negeri Sarawak [2004] 2 CLJ 186 CA ***(refd)***
Seven Seas Supply Co v. Rajoo [1965] 1 LNS 164 FC ***(refd)***
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(refd)***
Tan Ah Kek & Anor v. Wong Thang Song & Anor [2016] 1 LNS 232 CA ***(refd)***
Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***
United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b ***(refd)***

Legislation referred to:

Architects Act 1967, ss. 7A(1), 7B(1), 27A, 27B, 27C, 27D, 27E, 27F, 27G, 27H, 27I, 27J
Architects Rules 1996, Third Schedule rr. 3, 4, 5
Contracts Act 1950, ss. 24(a), (b), 66
Courts of Judicature Act 1964, s. 96(a)
Registration of Engineers Act 1967, ss. 7(1)(c), (1A)(d), 7A, 7B

For the appellant - Chan Kheng Hoe & Darryl Khor; M/s Kheng Hoe
For the respondent - Ranjan Chandran & Mohamed Noor Mahmood; M/s Mohamed Noor, Amran & Yoon

[Editor's note: Appeal from Session Court; Kuala Lumpur, Civil Suit No: WA-B52C-47-05-2016 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:

[1] The appellant who is the defendant in the Sessions Court, had appealed against the decision of the learned Sessions Court Judge ("SCJ") who allowed the respondent's claim of RM814,983.99 against the appellant for agreed consultancy fees.

Project

[2] The respondent as plaintiff below had sued, as an architect, the agreed consultancy fees for architectural fees, civil and structural ("C&S") engineering fees and mechanical and electrical ("M&E") engineering fees. It

is an agreed fact that the defendant had appointed the plaintiff as the main consultant for its helicopter hangar project ("the project") *vide* two letters of appointment dated 3 August 2010 and 19 November 2010.

[3] The total fees for the plaintiff's consultancy services amounted to RM1,404,984, consisting of the following:

(a) Architectural fees comprise RM786,791;

(b) C&S engineering fees comprise RM393,395; and

(c) M&E engineering fees comprise RM224,798.

[4] As the defendant had paid the sum of RM590,000, the plaintiff claimed in the suit below the balance sum of RM814,984.

Problem

[5] The defendant contended that the plaintiff had been negligent in the under design for the trusses for the hangars. They counterclaimed a sum of RM855,191.71 covering rectification works of RM354,265 being additional support necessary for the trusses and also a sum of RM130,000 being the fees incurred for engaging an independent engineering checker to check on the integrity of the trusses construction and special damages for negligence. The other component of the counterclaim is for RM370,926.71 being the LAD claim.

[6] In any event the defendant contended that the plaintiff could not claim for the engineering consultancy fees as they were not duly registered under the Registration of Engineers Act 1967 ("REA") and further that the fees for the M&E engineering work had not been proved as there was no evidence that such a service had been provided.

[7] The defendant also claimed general damages for breach of contract and for the tort of negligence.

[8] The learned SCJ had allowed the plaintiff's claim together with interest and costs and had dismissed the defendant's counterclaim with costs. Being dissatisfied with the said decision of the SCJ, the defendant had appealed to this court.

Prayers

[9] The defendant as appellant prayed that the SCJ's decision should be set aside and that the plaintiff's claim should be dismissed and instead the defendant's counterclaim should be allowed.

[10] The defendant argued that the plaintiff as an architect could only sue for his architectural consultancy fees and not for the C&S engineering and M&E engineering fees as only registered engineers under the Registration of Engineers Act 1967 could sue for such fees.

[11] It was further argued that the contract for the agreed engineering consultancy services and the fees arising out of it, is illegal and null and void and unenforceable.

[12] The defendant further argued that even though the defence of illegality was not raised in the pleadings, but raised for the first time in the submission stage before the SCJ, the SCJ was nevertheless bound to take cognizance of it and decide accordingly.

[13] With respect to M&E engineering fees, it was also contended by the defendant that there was no evidence that such a consultancy service had been provided and hence not proved, on the balance of probabilities.

Principles

Whether Illegality Has To Be Pleaded In That The Plaintiff's Claim Is Illegal And Unenforceable For Breach Of The Registration Of Engineers Act 1967

[14] It is clear that the plaintiff's fees as agreed with the defendant encompasses engineering fees.

[15] It is also clear that the plaintiff is a firm of architect and not engineers, and specifically the plaintiff is "not registered as a professional engineer under the REA". Section 7(1A) REA reads:

> (1A) A person shall not, unless he is a Professional Engineer with Practising Certificate:
>
> (a) practise, carry on business or take up employment which requires him to carry out or perform professional engineering services for designated engineering works subject to section 8; ...
>
> (d) **be entitled to recover in any court any fee**, charge, remuneration or other form of consideration **for any professional engineering services rendered** subject to section 8; ... (emphasis added)

[16] The necessary legal implication arising from the above is that the plaintiff who is not a "professional engineer with practising certificate" is "not entitled to recover in any court any fee, charge, remuneration or other form of consideration for any professional engineering services rendered".

[17] The defendant submitted that there are two exceptions to s. 7(1A)(d) of the Act, namely ss. 7A and 7B. Section 7A applies to engineering consultancy practice, but that exception is not applicable to the plaintiff.

[18] As for s. 7B which applies to a multi-disciplinary practice, it is subject to strict requirements namely:

(a) It must be a body corporate;

(b) It must have applied for registration with the board;

(c) It must be incorporated under the Companies Act;

(d) It must have a board of directors prescribed by the board;

(e) It must have a shareholding structure prescribed by the board; A

(f) It must have the minimum paid-up capital prescribed by the board;

(g) It must be under the control and management of a professional engineer with practising certificate authorised by the directors to make all final engineering decisions. B

[19] It was submitted that the plaintiff is thus not qualified to claim for engineering fees, under ss. 7, or 7A, or 7B REA.

[20] Learned counsel for the defendant referred to the following cases in support of the above proposition: C

(a) In *Sami Mousawi-Utama Sdn Bhd v. Kerajaan Negeri Sarawak* [2004] 2 CLJ 186; [2004] 2 MLJ 414, the Court of Appeal found a violation of the Act to be against the statutory provisions and public policy;

(b) In *Lion Asia Investment Pte Ltd v. Atelier Adt International Consultants Ltd & Anor* [2002] 5 CLJ 86, the court held that whether the Acts expressly or impliedly prohibited the claims, the claims would nevertheless fall foul of either s. 24(a) or (b) of the Contracts Act 1950. The court further held that the legal analysis is a straightforward application of the clear words of the Act to the facts; D

(c) In *Norman Disney & Young v. Affifi Hj Hassan* [2011] 1 CLJ 210, the court took the view that any attempt to circumvent the requirements of the Act would run foul of s. 24(a) and (b) of the Contracts Act 1950, and allowing any such claim would be to defeat the intention of Parliament. E

[21] Learned counsel for the defendant submitted that the learned Sessions Court Judge fell into error for the following reasons: F

(a) Because illegality was never pleaded;

(b) Because the facts and evidence with regard to the illegality was not raised at trial;

(c) Because it was the defendant who appointed the plaintiff as the main consultant, and the defendant is now estopped from raising the issue of illegality after the plaintiff has performed its part of the bargain; G

(d) Because the plaintiff being an architect, is permitted to claim as he did pursuant to the Architects Rules 1996. H

[22] The defendant's stand is that the Federal Court had pronounced authoritatively that courts are bound to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded.

[23] The rationale is quite simple: once a court of law is appraised of facts tending to support the suggestion of illegality, it must "take notice *ex proprio motu* and even though not pleaded ... for clearly, no court could knowingly be party to the enforcement of an unlawful agreement". I

[24] It would be fair to say that where illegality is not pleaded, one has to tread more cautiously and follow the dicta of the Federal Court case of *Seven Seas Supply Co v. Rajoo* [1965] 1 LNS 164; [1966] 1 MLJ 71 at 73-74. Though more than four decades ago, it is still a sound approach to follow. It reads:

> There remains the only other point of substance raised by the defendants that the loans were illegal and void under the provisions of the Moneylenders Ordinance, 1959 (No. 58 of 1959) and consequently not recoverable by the plaintiff. The ground of appeal was framed in this way:
>
> > That on the evidence the learned judge ought to have found (*albeit* that this was not pleaded by the defendants but referred to in the affidavit sworn by R. M. K. Naidu on the 9th of December, 1961) that the plaintiff was a moneylender and, there being no suggestion that he was licensed as such, that the loans made by the plaintiff were illegal and void and hence not recoverable by him.
>
> This defence was not pleaded.
>
> **Now it is well settled law that where a contract is *ex facie* illegal, the court will decline to enforce it, irrespective of whether illegality is pleaded or not**.
>
> The position is succinctly stated by Devlin J. in *Edler v. Auerbach* [1949] 2 All ER 692 at p 697 cited with approval in *Snell Unity v. Finance Ltd* [1963] 3 All ER 50 at p 55 in this way:
>
> > "That case" (*North-Western Salt Co Ltd Electrolytic Alkali Co Ltd* [1914] AC 461) "authorises, I think, four propositions: *first, that where a contract is ex facie illegal, the court will not enforce it whether the illegality is pleaded or not; secondly, that where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which taken by themselves show an illegal object have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not*".
>
> **The court therefore ought not, on its own initiative, to refuse to enforce a contract on the ground of illegality unless it is quite certain that all the relevant facts are in evidence**.
>
> So far from being certain that all the relevant facts were before the court it appeared to me that essential evidence was missing.
>
> The question of whether the plaintiff was a moneylender was disputed. The plaintiff was asked if he was a moneylender but he denied it and also the fact that the defendants had ever paid him interest. The matter was never explored in any detail nor given that close examination, it should have received and no doubt would have if it had been an issue and pleaded.

> In these circumstances it is impossible to say that all the relevant circumstances relating to the question of whether the plaintiff was a moneylender or not were before the court.
>
> I have come to the conclusion that the plaintiff is right in his contention that the third of those propositions enunciated by Devlin J. covers this case i.e. the court will not act on unpleaded facts unless it is satisfied that the whole of the relevant circumstances are before it. (emphasis added)

[25] I would say in the case before us, it appears to fall under the fourth proposition of Devlin J in *Edler v. Auerbach* [1949] 2 All ER 692 at p. 697, in that all the facts necessary to support the argument of an illegal object as in contravening s. 7(1A) REA are before the court.

[26] The defendant is right to say that the facts needed to be established to show that the plaintiff is not entitled to claim under the REA are very simply:

(a) The claim is for engineering fees;

(b) The claim is made by someone other than a professional engineer with practising certificate.

[27] Both these facts are adduced in evidence and that even a reference to the Act was made at trial. I agree that the conclusion if arrived at, that the agreement was illegal need not be put to the witnesses as that is a legal proposition and a matter for the court to decide irrespective of the parties' view one way or the other.

[28] However to be fair to the learned SCJ, she did proceed under para. 28 of her judgment to consider for completeness, the issue of illegality raised for the first time in the written submissions and rejected it for reasons given which this court shall now proceed to consider.

Whether Estoppel Would Apply In The Circumstances Of This Case Where The Defendant Had Agreed To The Plaintiff, As The Main Consultant, To Appoint An Engineering Consultant For The Engineering Consultancy Services

[29] I would further agree with learned counsel for the defendant that estoppel does not arise against any party raising the issue of illegality notwithstanding the party having participated in or even benefited from the illegal contract. He referred to the following cases as illustrating these points:

(a) In *Norman Disney & Young (supra)*, the defendant pleaded illegality despite having agreed to the contract initially - the plea of illegality was upheld;

(b) In *Raymond Banham & Anor v. Consolidated Hotels Ltd* [1975] 1 LNS 141; [1976] 1 MLJ 5, HC (Singapore), the court held the contract to be unenforceable notwithstanding the defendants' own participation in the illegal contract;

(c) In *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674, CA, the court considered parties to an illegal agreement or arrangement to be outside the pale of the law as such agreements and arrangements would be void *ab initio*;

(d) In *David Taylor & Son Ltd v. Barnett* [1953] 1 All ER 843, CA, the court held that an umpire must decline to make an award to enforce an illegal contract even if it goes against what he considered fair and reasonable in the circumstances;

(e) In *Tan Ah Kek & Anor v. Wong Thang Song & Anor* [2016] 1 LNS 232; [2016] MLJU 81, a case similar to the present case because illegality was not pleaded but only raised at the end of the trial; the court considered it an error of the JC to rule that it was unfair for the issue of illegality to be raised six years after the execution of the agreement and after the respondents had expended money on the said land by building the factory (thereby creating an estoppel ordinary).

[30] I agree with the defendant that if estoppel could be raised, then the case of *Tan Ah Kek & Anor (supra)* would have been the ideal case to raise the issue of estoppel, because monies were in fact expended by the respondent. Yet, the Court of Appeal disregarded the "fairness" of the situation and insisted on strict compliance when it comes to illegality.

[31] The argument of estoppel would also fail since there cannot be an estoppel to evade the plain provisions of a statute. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] MLJ 49 Viscount Radcliffe, Privy Council, at p 54 stated:

> ... a party cannot set up estoppels in the face of a statute ...

[32] In *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 Edgar Joseph Jr J (as he then was) at p. 356 observed as follows:

> The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute.

[33] It is thus clear that estoppel cannot be raised against a statute and indeed it has no bearing on illegality.

Whether The Claim By The Plaintiff As An Architect For The Component Of Engineering Consultancy Fees Is A Valid Claim Permitted Under Architects Rules 1996

[34] Learned counsel for the plaintiff referred this court to the statement of agreed facts dated 15 August 2016 where the following salient facts were agreed by the defendant:

(a) That the defendant appointed the plaintiff as the main consultant.

(b) That the plaintiff had appointed Iktisas Ingenieurs Sdn Bhd ("IISB") as structural and public engineer for the said project.

(c) That IISB was responsible for the design of the said project including structural steel works.

(d) That on 12 April 2012, IISB had supplied the design for the structural steel works for the said project to the defendant.

(e) By the letters of 13 April 2015, 10 June 2015, 5 August 2015, 2 October 2015, 5 November 2015 and 18 December 2015 the plaintiff had demanded the defendant to settle the outstanding amount of RM814,983.99.

[35] It was also a finding of fact of the learned SCJ that the defendant had agreed to the appointment of IISB as the civil and structural engineer for the said project.

[36] One must give due effect to the Architects Rules 1996 as the billing and claim were made by the plaintiff as a firm of architects. The question then is whether the Architects Act 1967 and the Architect Rules 1996 permit the architect to make such a claim.

[37] Section 7 of the Architects Act 1967 provides that:

> 7. **No person shall, unless he is an Architect**
>
> (a) be entitled to set up an architectural consultancy practice to render architectural consultancy services subject to section 7A;
>
> ...
>
> (c) **be entitled to recover in any court any fee**, charge, remuneration or other form of consideration f**or architectural consultancy services rendered as an Architect**. (emphasis added)

[38] Section 7A(1) provides as follows by way of reiteration:

> Architectural consultancy practice
>
> 7A. (1) An Architect shall not, unless registered as a sole proprietorship, a partnership or a body corporate and has been issued with a certificate of registration:
>
> (a) be entitled to set up an architectural consultancy practice to render architectural consultancy services; and
>
> (b) recover in any court any fee, charge, remuneration or other form of consideration for architectural consultancy services rendered as an architectural consultancy practice.

[39] Section 7B(1) of the Architects Act 1967 provides for the following with respect to a multi-disciplinary practice:

> A body corporate providing a combination of services comprising architectural consultancy services, professional engineering services or quantity surveying services.

A 7B.(1) Where a body corporate carries on a practice of providing a combination of services comprising architectural consultancy services, professional engineering services or quantity surveying services, the Board may, subject to such conditions or restrictions as it may deem fit to impose, register that part of the practice providing architectural consultancy services.

B

[40] The question then is, what if the registered architect did not carry out engineering consultancy services but with the consent of the client, engaged a professional engineer under the REA to carry out such engineering consultancy services and then invoiced the client for such engineering services rendered?

C

[41] The relevant rules in the Third Schedule of the Architect Rules 1996 on Conditions of Engagement of an Architect provide as follows:

THIRD SCHEDULE

D [Rule 29]

PART ONE

CONDITIONS OF ENGAGEMENT OF AN ARCHITECT

[Subrule 29(1)]

E Architect who carries on business as an architectural consultancy practice.

1. (1) An Architect who carries on business as an architectural consultancy practice shall provide architectural consultancy services as described in the scope of services incorporated in the Memorandum of Agreement between the Architect and the client.

F (2) The architectural consultancy services provided by the Architect shall be in accordance with the Architects (Scale of Minimum Fees) Rules 2010

(3) The Architect shall be remunerated solely by fees payable by the client for architectural consultancy services provided by him.

Engagement of consultants by client.

G 2. An Architect shall advise the client on the need for other consultants to be engaged for any part of the project and unless otherwise agreed upon, the consultants shall be engaged and paid by the client.

Engagement of consultants by Architect.

H **An Architect may be required to engage his own consultants and if the engagement is approved by the client, the fees which would have been payable to such consultants if they were separately engaged shall be paid through the Architect.**

4. Coordination of consultants' works.

I An Architect shall instruct the consultants and coordinate the consultants' works where required, whether the consultants are engaged pursuant to paragraph 2 or 3.

5. Architect not liable for acts etc. of consultants engaged by client.

Where consultants are engaged by the client for any part of the project pursuant to paragraph 2, the Architect shall not be liable for their performance, acts or omissions.

6. Architect responsible for acts etc. of consultants engaged by him.

Where consultants are engaged for any part of the project pursuant to paragraph 3, the Architect shall be primarily responsible for their performance, acts or omissions.

7. Client's agreement.

(1) An Architect shall obtain the written agreement of the client in respect of his remuneration for architectural consultancy services to be provided by him pursuant to subparagraph 1(1) within sixty days from the date the notification regarding such remuneration is duly served on the client.

(2) Notwithstanding subparagraph (1), where the client's agreement in writing is not obtained within the period as stipulated in subparagraph (1) but the client agrees by his conduct to the conditions of engagement and the scale of professional fees and charges, the client shall for the purposes of subparagraph (1) be considered to have agreed to such conditions of engagement and scale of professional fees and charges. (emphasis added)

[42] As is clear from r. 3 above, the professional engineering services are still being provided by professional engineers duly registered under the REA and it is only where the invoicing of fees is concerned that it is done through the architect.

[43] In most standard form construction contracts the superintending officer (S.O.) may be the architect and the burden would be on him to instruct the engineer and to coordinate the engineer's work as provided in r. 4 above. It is not a case of subordinating the professional engineers to the architects but rather that there is a need to have a person to be the S.O. for the project. The architect is certainly not taking over the work of the professional engineers but merely invoicing on the engineer's behalf the share of his fees.

[44] This makes sense as the employer need not then have to enter into separate contracts with each of the consultants ie, the architect, the engineer and the quantity surveyor. Where the employer has engaged its own engineer or any other consultants, the architect is not liable for the performance, acts or omissions of the consultants as provided under r. 5 above. That flows from the privity of contract principle in that only parties to a contract may sue each other.

[45] Conversely where the architect has engaged its own consultants with the consent of the employer, then the architect would be liable for the said consultants' performance, acts or omissions. The contract is not between the employer and these consultants but the employer and the architect on the one hand and between the architect and the consultants on the other hand.

[46] Learned counsel for the defendant does not think so because according to him, r. 3 did not specify that the consultants would be engineering consultants. There are many forms of consultants involved in the design and construction of any building or project including consultants for landscape, facade, interior design, etc.

[47] I do not understand why the word "consultants" in r. 3 cannot be extended to engineering consultants when already in a multi-disciplinary practice under s. 7B would cover professional engineers' services and consultant quantity surveyors' services.

[48] Even interior designers are now covered by part VA of the Architects Act 1967 from s. 27A to s. 27J.

[49] Learned counsel for the defendant further argued that a lot of the consultancy work required (other than engineering consultancy) would not be regulated by any specific act of Parliament. Hence, there is nothing wrong with r. 3 insofar as it relates to these unregulated consultancies. However, according to the defendant, when it comes to engineering consultancy services, there is a specific Act of Parliament which applies, namely the REA.

[50] It was further submitted by the defendant that *generalia specialibus non derogant* applies in that a specific statute would prevail over a general one. The defendant's stand is that where engineering consultancy services are concerned, not only must it be provided by professional engineers duly registered under the REA but also that all invoicing and billing must be in the name of the engineering firm for only an engineering firm can sue for its fees.

[51] Section 7(1)(c) REA provides as follows:

> 7(1)(c) No person shall, unless he is a Professional Engineer:
>
> be entitled to recover in any court any fee, charge, remuneration or other form of consideration for any professional engineering services rendered.

[52] I think one must be careful not to miss the point: the architect here is not providing the services of engineering consultant but the professional engineers in IISB. The architect is merely invoicing the employer for the fees of the professional engineers in that it is merely collecting the engineering services fees on behalf of the engineering firm or body corporate as in this case. The engineering company cannot bill or sue for its fees against the employer because it has no privity of contract with the employer but with the architect.

[53] The Architects Rules 1996 coming after the REA 1967 must have taken into consideration the provisions of a prior statute in the REA before settling for r. 3 in permitting the architect to collect fees of the engineer on its behalf.

[54] Therefore, this is not a case of a specific statute trumping over a general one but rather two different statutes, one for the engineers under the REA and one for the architects under the Architects Act 1967 and both can be read harmoniously as in accommodating each other.

[55] It was further submitted that if indeed r. 3 covers engineering consultancy, then it obviously is in contradiction to the REA. In such a case, it was argued, r. 3 becomes void to the extent of the inconsistency, ie, insofar as it relates to engineering consultancy fees.

[56] Learned counsel for the defendant stated that this is a well-established principle upheld by the superior courts, as seen in the following cases:

(a) In *Ramachandram Appalanaidu & Ors v. Dato Bandar Kuala Lumpur & Anor* [2012] 1 LNS 625; [2012] 6 MLJ 519, CA clearly stipulates that a delegated legislation cannot override any Act;

(b) In *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201; [2008] 3 MLJ 753, even the rules of the Federal Court could not override s. 96(a) of the Courts of Judicature Act 1964.

[57] Where a multi-disciplinary practice of an architectural consultant under a company incorporated under the Companies Act 2012 may produce a single invoice for services such as architectural consultancy combined with engineering services and consultant quantity surveyor services, I cannot see how it could be a conflict with the REA for an architectural firm to invoice the employer on behalf of the engineering company the engineering services fees.

[58] This is not in conflict with the REA but in tandem and consistent with the Architects Act 1967 and the Architect Rules 1996 under which the billing is done.

Whether Assuming That To Bill For The Engineering Services Rendered The Plaintiff Has To Be Incorporated Under Section 7B Of The Architects Act 1967 As In A Multi-disciplinary Practice, Section 66 Contracts Act 1950 May Nevertheless Be Invoked To Allow The Plaintiff's Claim

[59] The defendant's argument is that, if at all the learned SCJ wanted to save any part of the plaintiff's claim, she could at most save the claim for architectural fees only. Architectural fees amounted to RM786,791, out of which RM590,000 has been admitted to have been paid, leaving a balance of RM196,791.

[60] The defendant further submitted that even this claim is tainted with illegality because it falls under the same contract, but if the architectural fees were deemed to be severable, then this portion would admittedly be due.

[61] This court has taken the view that both the claim for architectural fees and engineering consultancy fees are unaffected by the REA and that the Architects Act 1967 and the Architect Rules 1996 allow for it.

[62] However, assuming for a moment that such a billing is only allowed under a multi-disciplinary practice as envisaged in s. 7B of the Architects Act 1967 under a company incorporated under the Companies Act 2016, then as the plaintiff is not so incorporated but practices as a firm, then it is illegal for the architect to sue for the portion of the engineering services fees.

[63] Section 24(a) of the Contracts Act 1950 provides that if the object of an agreement is forbidden by law then the object is unlawful and the agreement whose object is unlawful is void.

[64] Section 66 of the Contracts Act 1950 provides as follows:

> Obligation of person who has received advantage under void agreement, or contract that becomes void
>
> 66. When an agreement is **discovered to be void**, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. (emphasis added)

[65] Section 66 of the Contracts Act 1950 provides for restitutionary remedy to the innocent party when a contract is discovered to be void. Here is a case where the plaintiff thought it was perfectly all right to have come under r. 3 of the Third Schedule to the Architects Rules 1996 on conditions of engagement of an architect to have been perfectly proper and legal to bill on behalf of the engineer appointed with the consent of the defendant, the engineering services component of the agreed total consultancy fees for the project.

[66] The defendant had no qualms or quarrel with and indeed consented to the plaintiff appointing IISB as the engineering consultant for the engineering consultancy services to be rendered. It can be safely surmised that the defence of illegality was raised as an afterthought for the first time in the written submission of the defendant and was not raised in the pleadings.

[67] It would be fair to say that both the plaintiff and the defendant were unaware when the two letters of appointment were issued on the prohibition on the plaintiff billing on behalf of the engineer the fees for the engineering services rendered by IISB.

[68] Having therefore received a benefit under the said agreement in that the engineering services had been provided for an agreed fees, it is then not open to the defendant to refuse to pay on ground that the agreement is tainted with illegality.

[69] It is incongruent and indeed unacceptable for the defendant now to rely on the high pedestal of illegality to avoid a legal obligation to pay for the benefit it had bargained for and received. It is in such a circumstance that s. 66 of the Contracts Act 1950 comes in aid of the innocent party claiming for its fees. I can do no better than to refer to the precedent set by His

Lordship Azmi LP in the Federal Court case of *Ng Siew San v. Menaka* [1973] 1 LNS 99; [1973] 2 MLJ 154 where at p. 156 His Lordship opined after setting out s. 66 of the Contracts Act 1950:

> In deciding this question the learned judge firstly made the following findings:
>
> 1. that both parties had no knowledge of the illegality until the affidavit by Nachiappa Chettiar had been filed, and
> 2. there was no evidence upon which such knowledge could be imputed to either of them.

[70] At p. 157 His Lordship, continued:

> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by law; or
>
> (b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or
>
> (c) it is fraudulent; or
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> From the above provisions the agreement in the instant case being forbidden by law is thereby void. The principle is clearly stated by Parke B. in *Cope v. Rowlands* (1836) 2 M & W 149 at p. 157 in the following words:
>
> > It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract. ...
>
> The next question is whether section 66 of our Contracts Ordinance applies. I have already set out the grounds upon which counsel for Ng argued before us that section 66 could not apply to this case. In deciding this question in favour of Menaka the learned judge made two findings of fact namely, both parties were not aware of the illegality at the time of the execution of the documents and it was only discovered when the statement of defence was filed ...

As to the effect of section 66, the learned trial judge cited the following passage from the judgment of Chandra Reddy C.J. in *Kanuri Sivaramakrishnaiah v. Vemuri Venkata Narahari Rao* AIR 1960 And Pra 186 at p 188:

> "It is manifest that in order to invoke this action, the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e. without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal.
>
> The effect of section 65, (section 66 of the Malayan Contracts Ordinance) is that, in such a situation, it enables a person not in *pari delicto* to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the *status quo ante*.

In the circumstances, I would say that the judge was right that Ng should restore the advantage he had received by returning the amount he received from Menaka. That is to say Ng has to return $19,400 to Menaka.

Mr. Palasuntharam, however, argued that the learned judge should have awarded interest. He pointed out in the case of *Harnath Kaur v. Indar Bahadur Singh* LR 50 IA 69 the Privy Council awarded interest at the rate of 6% from the date of the institution of the suit in that case. I agree.

[71] On further appeal to the Privy Council, the decision of the Federal Court was affirmed in *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91. Lord Fraser of Tullybelton in delivering the judgment of the Privy Council observed at p. 94 the following:

> Mohamed Azmi J. gave effect to section 66 by finding that the advantage which the borrower had received under the contract was the sum of $20,000 and that he should restore that sum to the appellant. But as he had made two payments of interest amounting together to $600 the learned judge found that the $600 was an advantage received by the lender and that it should be deducted from the $20,000 leaving a balance of $19,400 to be paid to the respondent who now represents the borrower. Leaving aside for the moment the question of whether any interest should also be payable, their Lordships agree with both Courts below that the principal sum of $19,400 should be paid by the respondent to the appellant. In that way effect will be given to section 66 under which each party is bound to restore any advantage which he has received to the person from whom he received it-see *Govindram Seksaria v. Radborne* (1947) LR 74 Ind App 295, 303 where Lord Morton of Henryton said:

> The result of section 65 of the Indian Contract Act was that, as from [the date on which the contract became void] each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.

Section 65 of the Indian Contract Act, 1872, is in terms identical with those of section 66 of the Contracts (Malay States) Ordinance, 1950. The principle underlying both sections is the same, and it is that:

> a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation.

See *Babu Raja Mohan Manucha v. Babu Manzoor Ahmad Khan* (1942) LR 70 Ind App1, 10. ...

[72] I have no doubt that the defendant cannot avoid its obligation to pay for the agreed fees for the engineering consultancy services rendered by IISB and billed through the plaintiff on ground of illegality as the plaintiff had proceeded on the basis that it was perfectly permissible for it to do so and the defendant had even consented to this arrangement that seems to have the approval of r. 3 of the Third Schedule to the Architects Rules 1996.

[73] Section 66 of the Contracts Act 1950 would apply to prevent the defendant from retaining the benefit of the engineering services rendered without payment and further would constrain the defendant to pay for the benefit it had received.

Whether The Learned Sessions Court Judge Erred In Fact And In Law When She Allowed The Plaintiff's Claim For M&E Engineering Works

[74] There is a total sum of RM224,798 allocated for M&E works. However, according to the defendant, the only evidence put before the court was that of C&S works, and no M&E works.

[75] Without a single M&E drawing submitted, it was argued that the plaintiff had not proven that it had carried out any M&E works. The defendant concluded that therefore, at the very least, a sum of RM224,798 must be deducted from the amount awarded to the plaintiff.

[76] However, the defendant in its defence and counterclaim had not challenged the plaintiff with respect to the M&E services provided. The defendant did not deny that the M&E services were ever provided at all or adduce evidence that the M&E consultancy services were provided by another engineer.

[77] The defence and counterclaim taken as a whole was centred on the negligence on the part of the plaintiff. In this appeal, the defendant had not pursued the appeal against the dismissal of the defendant's counterclaim for negligence.

[78] The consultants appointed by the plaintiff, IISB, had furnished the drawings direct to the defendant. When cross-examined SP3, Encik Wan Ahmad Nizar, the engineer from IISB, had stated that the fees components cover both the C&S as well as the M&E works.

[79] It was not put to him under cross-examination that the M&E consultancy services were not provided. The requirement of putting a contrary position to the witness being cross-examined is of crucial importance. As was observed in *Browne v. Dunn HL* (1894) 6 R 67 at pp. 70-71 by Lord Herschell LC as follows:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, *where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged*, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. (emphasis added)

[80] The Federal Court very recently in *Ng Siew Lan v. John Lee Tsun Vui & Anor* [2017] 2 CLJ 245; [2017] 2 MLJ 167, after affirming once again the rule in *Browne v. Dunn (supra)* as part of our jurisprudence, observed as follows:

> [26] The same point was lucidly explained by Mukharji J in *AEG Carapiet v. AY Derderian* AIR 1961 Cal 359 in the following terms:
>
> > The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. **It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice**. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he asked no question with regard to this, then he must be taken to

> accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (emphasis added)

[81] The learned SCJ had made a finding of fact that the plaintiff had proved on the balance of probabilities that the M&E consultancy services had been provided. In spite of the many demand letters for payment, the defendant had not denied that the M&E consultancy services were not provided.

[82] The learned SCJ, being the trial judge, had the audio-visual advantage of having heard the three witnesses from the plaintiff and another three witnesses from the defendant. Matters of weight and sufficiency of evidence are best left to the trial judge unless it can be shown that the trial judge had arrived at a perverse finding not substantiated or supported by the evidence adduced.

[83] Overall, it would be difficult to envisage how a hangar project can be carried out without any mechanical and electrical drawings or input from the consulting engineers.

Pronouncement

[84] Having carefully considered the issue of illegality raised and the challenge on the finding of facts with respect to whether the plaintiff had proved on a balance of probabilities the M&E consultancy services claimed, I am of the view that the circumstances taken as a whole do not justify appellate intervention.

[85] The decision and judgment of the learned SCJ is upheld and the defendant's appeal is dismissed with costs of RM10,000 to be paid by the defendant to the plaintiff and deposit of costs of this appeal to be paid to the plaintiff towards account of the costs of this appeal.